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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

12 SECURITIES AND EXCHANGE COMMISSION,

15 Plaintiff,

VS.

15 TOTAL WEALTH MANAGEMENT,
16 INC.; et al.,

17 Defendants.

Case No. 15-cv-226 BAS (DHB)

**NO HEARING REQUIRED UNLESS
REQUESTED BY COURT**

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
FIRST INTERIM APPLICATIONS
FOR PAYMENT OF FEES AND
REIMBURSEMENT OF RECEIVER,
KRISTEN A. JANULEWICZ, AND
ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP**

[Notice of Applications for Payment of Fees and Reimbursement of Expenses; First Interim Application of Receiver; First Interim Application of Allen Matkins; Declaration of Kristen A. Janulewicz; and [Proposed]Order submitted concurrently herewith]

Date: November 2, 2015

Ctrm: 4B

Judge: Hon. Cynthia Bashant

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION.**

3 Pursuant its February 12, 2015 "(1) Preliminary Injunction, Appointment of a
 4 Permanent Receiver, and Related Orders; and (2) Order Vacating Hearing on
 5 Preliminary Injunction" (the "Permanent Appointment Order"), this Court appointed
 6 Kristen Janulewicz (the "Receiver"), as the permanent receiver for Defendant Total
 7 Wealth Management, Inc. ("Total Wealth") and its subsidiaries and affiliates,
 8 including, but not limited to Altus Capital Management, LLC (collectively, the
 9 "Receivership Entities" or "Entities"), in connection with a request by the Securities
 10 and Exchange Commission (the "Commission").

11 Since her appointment, the Receiver, with assistance from her counsel, Allen
 12 Watkins Leck Gamble Mallory & Natsis LLP ("Allen Watkins"), has diligently
 13 carried out her duties in accordance with the Court's Orders, including the
 14 Permanent Appointment Order and its May 8, 2015 Order Granting Motion for
 15 Order in Aid of Receivership ("Motion for Order in Aid"), approving the Receiver's
 16 engagement of Allen Watkins. Pursuant to Section XVI of the Permanent
 17 Appointment Order, and Section 6(c) of the Motion for Order in Aid, the Receiver
 18 and Allen Watkins each hereby submit their respective First Interim Applications for
 19 Payment of Fees and Reimbursement of Expenses (the "Applications"), for fees and
 20 costs incurred by the Receiver and her agents and counsel from the inception of the
 21 receivership on February 4, 2015 through June 30, 2015 (the "Application Period").
 22 The Applications seek interim approval of \$195,832.90 in fees incurred by the
 23 Receiver during the Application Period, and authorization for the Receiver to pay,
 24 on an interim basis, 90% of the fees incurred, in the amount of \$176,249.61. The
 25 Applications further seek the approval of Allen Watkins' fees and costs in the
 26 amount of \$252,037.35 and \$17,081.93, respectively, and authorization for the
 27 Receiver to pay Allen Watkins, on an interim basis, 80% of its fees incurred, in the
 28

1 amount of \$201,629.88 and 100% of its expenses in the amount of \$17,081.93, from
 2 the assets of the Receivership Entities.

3 **II. RELEVANT FACTUAL BACKGROUND.**

4 A full recitation of the procedural history of the above-captioned action is
 5 unnecessary for the purposes of the Applications, and is presented completely and in
 6 detail in the Receiver's previously submitted Initial Report and Recommendations
 7 and Petition for Instructions (the "Initial Report") and her First Interim Report and
 8 Petition for Further Instructions (the "First Interim Report"), each of which
 9 summarize the efforts of the Receiver and her professionals¹ since the
 10 commencement of the instant receivership. The facts most relevant to the
 11 Applications are as follows:

12 The above-captioned enforcement action commenced with the Commission's
 13 Complaint (the "SEC Complaint"), submitted on February 3, 2015, against
 14 Defendants Total Wealth and Jacob Keith Cooper (See Docket No. 1.) The
 15 Commission's Complaint alleged that Defendants violated the federal securities
 16 laws, including by allegedly breaching their fiduciary duties to investors, wrongfully
 17 deploying client funds for their own, personal purposes, and committing fraud. The
 18 Court entered the Permanent Appointment Order on February 12, 2015, granting the
 19 Commission's request for the appointment of the Receiver, and imposing certain
 20 injunctive relief against the Receivership Entities and anyone acting in concert with
 21 them. (See Docket No. 8.) On May 8, 2015, this Court granted the Receiver's
 22 request for an Order in Aid of Receivership, clarifying certain administrative matters
 23 and providing the Receiver with certain specific authority regarding
 24 communications with Entity investors and protection of private information, among
 25 other things. (See Docket No. 31.)

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¹ For the purposes of this Application, the only professionals seeking compensation are Allen Matkins.

1 Since her appointment, the Receiver has assumed control over the
 2 Receivership Entities and their estate (the "Estate"), and commenced a detailed
 3 review of their business and financial activities. The Receiver expects this effort
 4 will enable her to better understand and provide an accounting for the Entities'
 5 affairs, and to identify, locate, and recover assets of the Receivership Entities, as
 6 directed in the Permanent Appointment Order. (See concurrently filed Declaration
 7 of Kristen A. Janulewicz ["Janulewicz Decl."] ¶ 2.) Again, the specific actions
 8 taken by the Receiver are described in detail in her Initial Report and First Interim
 9 Report. Having diligently carried out their duties in connection with the instant
 10 receivership, the Receiver and Allen Matkins now request that the Court authorize
 11 the interim payment of their respective fees and expenses, through June 30, 2015,
 12 from the assets of the Estate as addressed here and in the Applications.

13 **III. ARGUMENT.**

14 **A. The Applications Are Reasonable And Appropriate And Payment
 15 Should Be Authorized.**

16 "As a general rule, the expenses and fees of a receivership are a charge upon
 17 the property administered." Gaskill v. Gordon, 27 F.3d 248, 251 (7th Cir. 1994).
 18 These expenses include the fees and expenses of the Receiver and her professionals.
 19 Decisions regarding the timing and amount of an award of fees and costs to the
 20 Receiver and her professionals are committed to the sound discretion of the Court.
 21 See SEC v. Elliot, 953 F.2d 1560, 1577 (11th Cir. 1992) (rev'd in part on other
 22 grounds, 998 F.2d 922 (11th Cir. 1993)).

23 1. The Fees and Expenses Requested in the Applications are
 24 Reasonable.

25 In determining the reasonableness of fees and expenses requested in this
 26 context, the Court should consider the time records presented, the quality of the
 27 work performed, the complexity of the problems faced, and the benefit of the
 28 services rendered to the receivership estate. SEC v. Fifth Avenue Coach Lines, Inc.,

1 364 F.Supp. 1220, 1222 (S.D.N.Y. 1973); see also Southwestern Media, Inc. v. Rau,
 2 708 F.2d 419, 427 (9th Cir. 1983) (superseded on other grounds by statute as stated
 3 in In re Hokulani Square, Inc., 460 B.R. 763, 768 (9th Cir. BAP 2011)).

4 Here, the Applications describe the nature of the services that have been
 5 rendered, and, where appropriate, the identity and billing rate of the individual(s)
 6 performing each task. The Receiver and Allen Matkins have endeavored to staff
 7 matters as efficiently as possible in light of the level of experience required and the
 8 complexity of the issues presented. Moreover, both the Receiver and Allen Matkins
 9 seek payment, on an interim basis, of only a percentage of the fees and costs
 10 incurred, in recognition of the fact that the work on this matter is ongoing. The
 11 Receiver seeks payment of 90% of fees incurred during the Application Period, in
 12 the amount of \$176,249.61. Allen Matkins seeks payment of 80% of its fees
 13 incurred during the Application Period, totaling \$201,629.88, plus 100% of its
 14 expenses, totaling \$17,081.93. Payment of the proposed 10% and 20% holdbacks,
 15 respectively, will be sought at the conclusion of the receivership. In general, the
 16 Applications reflect the Receiver's and Allen Matkins' customary billing rates and
 17 the rates charged for comparable services in other matters, less any discounts or
 18 reductions specifically identified in the Applications.

19 The Receiver has reviewed the Applications, and believes the fee and expense
 20 requests to be fair and reasonable, and an accurate representation of the work
 21 performed for the benefit of the Receivership Entities. (See Janulewicz Decl. ¶ 3.)
 22 The Receiver has likewise determined that the Estate has actually benefited from the
 23 services. (Id.)

24 2. The Fees and Expenses Requested in the First Fee Applications
 25 have been Submitted to the Commission, Without Objection.

26 Courts give great weight to the judgment and experience of the Commission
 27 relating to receiver compensation. "[I]t is proper to [keep] in mind that the
 28 [Commission] is about the only wholly disinterested party in [this] proceeding and

1 that ... its experience has made it thoroughly familiar with the general attitude of the
 2 Courts and the amounts of allowances made in scores of comparable proceedings."
 3 In re Philadelphia & Reading Coal & Iron Co., 61 F.Supp. 120, 124 (D.C. Pa. 1945).
 4 Indeed, the Commission's perspectives are not "mere casual conjectures, but are
 5 recommendations based on closer study than a district judge could ordinarily give to
 6 such matters." Finn v. Childs Co., 181 F.2d 431, 438 (2d Cir. 1950) (internal
 7 quotation marks omitted). In fact, "recommendations as to fees of the
 8 [Commission] may be the only solution to the 'very undesirable subjectivity with
 9 variations according to the particular judge under particular circumstances' which
 10 has made the fixing of fees seem often to be 'upon nothing more than an ipse dixit
 11 basis.'" Id. Thus, the Commission's perspective on the matter should indeed by
 12 given "great weight," as observed by the court in Fifth Avenue Coach Lines, Inc.,
 13 364 F. Supp. at 1222.

14 In order to ensure that the fees and expenses requested in the Applications are
 15 appropriate, the Receiver and Allen Matkins submitted their respective invoices to
 16 the Commission for review. The Commission has indicated that it does not object to
 17 the requested fees and costs. The Commission's apparent satisfaction with the
 18 subject invoices therefore merits significant deference. As the Philadelphia &
 19 Reading Coal & Iron Co. court observed, the Commission is "thoroughly familiar
 20 with ... the amounts of allowances made in scores of comparable proceedings." 61
 21 F.Supp. at 124. Indeed, the Commission is likely in the best position to measure the
 22 fees and costs requested here against those incurred in other, similar proceedings,
 23 and cases of similar complexity. The Receiver and her Professionals thus
 24 respectfully request that the Court approve all requested fees and expenses reflected
 25 in the Applications.

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1 **B. The Receiver Should Be Authorized To Pay Allowed Fees And
2 Expenses From Cash On Hand.**

3 The Receiver presently holds approximately \$3,472,742.29 for the benefit of
4 the Receivership Entities. (See Janulewicz Decl. ¶ 2.) In the aggregate, the
5 Receiver holds funds well in excess of those requested in the Applications, and the
6 Receiver respectfully requests the Court's permission to pay requested fees and costs
7 from the cash on hand and available from the accounts of the Receivership Entities.

8 **IV. CONCLUSION.**

9 The Receiver and Allen Matkins therefore respectfully request that this Court
10 enter an Order:

- 11 1. Approving the Receiver's fees, in the amount of \$195,832.90;
- 12 2. Authorizing and directing the Receiver to pay herself 90% of approved
13 fees, or \$176,249.61, from the assets of the Receivership Entities, on an interim
14 basis;
- 15 3. Approving Allen Matkins' fees, in the amount of \$252,037.25;
- 16 4. Authorizing and directing the Receiver to pay Allen Matkins 80% of
17 approved fees, or \$201,629.88, from the assets of the Receivership Entities, on an
18 interim basis;
- 19 5. Approving Allen Matkins' costs, totaling \$17,081.93, and authorizing
20 and directing the Receiver to reimburse Allen Matkins for such costs in full.

21
22 Dated: September 21, 2015

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP
DAVID R. ZARO
JOSHUA A. DEL CASTILLO

25 By: /s/ Joshua A. del Castillo
26 JOSHUA A. DEL CASTILLO
27 Attorneys for Receiver
28 Kristen A. Janulewicz

PROOF OF SERVICE

Securities and Exchange Commission v. Total Wealth Management, Inc., et al.
USDC, Southern District of California – Case No. 15-cv-226 BAS (DHB)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 515 S. Figueroa Street, 9th Floor, Los Angeles, California 90071-3398.

A true and correct copy of the foregoing document(s) described below will be served in the manner indicated below:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
FIRST INTERIM APPLICATIONS FOR PAYMENT OF FEES AND
REIMBURSEMENT OF EXPENSES OF RECEIVER, KRISTEN A.
JANULEWICZ, AND ALLEN MATKINS LECK GAMBLE MALLORY
& NATSIS LLP**

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC
FILING ("NEF")** – the above-described document will be served by the Court
via NEF. On September 22, 2015, I reviewed the CM/ECF Mailing Info For
A Case for this case and determined that the following person(s) are on the
Electronic Mail Notice List to receive NEF transmission at the email
address(es) indicated below:

- **Vincent J. Brown**
vince@vjblaw.com,vjblaw@gmail.com
 - **John Bulgozdy**
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 - **Joshua Andrew del Castillo**
jdelcastillo@allenmatkins.com

2. **SERVED BY U.S. MAIL OR OVERNIGHT MAIL (indicate method for each person or entity served):** On September 22, 2015, I served the following person(s) and/or entity(ies) in this case by placing a true and correct copy thereof in a sealed envelope(s) addressed as indicated below. I am readily familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion for party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 (one) day after date of deposit for mailing in affidavit.

8 Mikel R. Bistrow, Esq. **Via U.S. First Class Mail**
9 Ballard Spahr LLP
10 655 W. Broadway, Suite 1600
San Diego, CA 92101
11 Richard M. Kipperman **Via U.S. First Class Mail**
12 PO Box 3010
La Mesa, CA 91944-3010

13 I declare that I am employed in the office of a member of the Bar of this Court
14 at whose direction the service was made. I declare under penalty of perjury under the
15 laws of the United States of America that the foregoing is true and correct. Executed
on September 22, 2015 at Los Angeles, California.

Martha Diaz